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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

No. 76-329

CORDECO DEVELOPMENT CORPORATION,

*Petitioner,*

*against*

ANTONIO SANTIAGO VASQUEZ, INEZ ACEVEDO, as Sub-Secretary of the Department of Natural Resources of the Commonwealth of Puerto Rico, and individually; ZENON MERCADO MERCADO, as an Officer of the Department of Natural Resources, and individually; and PEDRO NEGRON RAMOS, individually and in his capacity as the Secretary of the Department of Natural Resources,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

**REPLY TO RESPONDENTS'  
BRIEF IN OPPOSITION**

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**REPLY TO RESPONDENTS'  
BRIEF IN OPPOSITION**

Petitioner received opposition to its petition for a writ of certiorari from respondents Antonio Santiago Vasquez and Pedro Negron Ramos on November 2, 1976. No opposition brief was filed by respondents Inez Acevedo de Compos and Zenon Mercado Mercado.

### **Question Presented**

#### **I. Qualified Immunity—Applicability to Public Officials Placing Responsibility Upon Subordinates.**

Respondent Vasquez states that any wrong done to petitioner was by his subordinates, Inez Acevedo de Compos and Zenon Mercado Mercado. He maintains that the Department of Public Works was one of the largest governmental departments and could not function if its head had to accept responsibility for the errors of subordinates. Such position is stressed despite the fact that it is admitted that it was the Secretary, and not his subordinates, that was statutorily mandated to exercise discretion regarding the granting or denying of sand extraction permits.

1. Can the head of an executive department of government under a statutory duty to perform a delineated function claim a qualified immunity over his inaction by shifting any and all responsibility upon his subordinates even though evidence demonstrates that each party was aware of the facts and circumstances giving rise to such conduct?

### **Reply Statement**

Petitioner's initial statement adequately presents the significant facts germane to a decision herein. The reply statement shall not amplify upon those facts, but seeks only to clarify such misstatements as are contained in the respondents' counterstatement.

### **1949 Division of the Land in Question**

Respondents Negron and Vasquez allege that they were justified in withholding the decision upon the Cordeco sand extraction application due to, inter alia, questions raised by the 1949 division of the Abreu property. Respondents' counsel patently misrepresents the unequivocal and unchallenged testimony of the drafter of the division, Hector Reichard, who testified that he divided the entire property among the six heirs without leaving a remnant.<sup>1</sup> It further went unchallenged that each land owner deriving title from the original division paid taxes not on a so-called reduced acreage, but on land up to the water's edge.<sup>2</sup> The "confusion" that "necessitated" withholding a decision upon the Cordeco application did not stop Secretary Vasquez from issuing permits to all others who claimed land under the 1949 division. With the exception of the Cordeco property, sand was uniformly removed and sold.<sup>3</sup>

### **Inaction of Secretaries Vasquez and Ramos—Subordinate-Control Theory**

Respondent Vasquez relies upon the theory of "subordinate-control" over the decision-making process concerning permit applications. Such theory, artfully tailored by counsel to the exigencies of appellate argument, fails to consider two points: (a) this theory was never presented by the respondent at trial—he chose to remain mute despite being present daily; (b) the clear and uncontradicted evidence that during his tenure as Secretary of the De-

<sup>1</sup> Due to what must be deemed the conscious misstatements of counsel for the respondents, petitioner deems it prudent to refer the Court to the appellate appendix: A60, 62, 63.

<sup>2</sup> A83-84.

<sup>3</sup> A63.



partment of Public Works not a single landowner, other than Cordeco, was not granted a permit though each claimed under the same deed containing the same "ambiguities" found to apply to Cordeco's application. The empowering signature on each permit was not that of a subordinate, but of Secretary Antonio Santiago Vasquez—the individual statutorily mandated to grant or deny the permit applications. Reality does not disappear merely by turning one's back on it.

The bureaucratic machinations of respondent Negrón who failed to act though possessing full knowledge of the facts and circumstances of the Cordeco application and the nullity known as the "Matos permit" deserve no further comment.

## REASONS FOR GRANTING THE WRIT

### I. The decision below granting immunity to executive officials who failed to perform their statutory duty is in direct conflict with the principles of qualified immunity as stated by this Court.

Petitioner's reply shall answer only such points as are raised in respondents' brief. Although respondents in essence argue the merits of petitioner's claim below, as opposed to the merits of the petition, such argument underscores the necessity for granting a writ of certiorari.

#### Reliance on Subordinate Conduct in Seeking Immunity

Secretary Vasquez states that the wrongs committed by respondents Acevedo and Mercado should not be imputed upon him as he was the head of a large department of government and cannot be held accountable for the conduct

of his subordinates. As stated, this theory was never raised at trial—Vasquez choosing not to utter a word in his own defense.

In support of this position, respondent cites to the cases of *Barr v. Matteo*, 360 U.S. 564 (1959) and *Robertson v. Sichel*, 127 U.S. 507 (1888). *Barr* is the definitive case upon absolute as opposed to qualified immunity and does not treat the question of superior versus subordinate responsibility. *Robertson* involved a tort action against a customs commissioner wherein the sole wrong done to the plaintiffs was by subordinate dock inspectors carrying out a discretionary function (customs assessment). Contrary to the present action, there were no direct allegations against the commissioner, that action being prosecuted solely upon the theory of respondeat superior. Herein, Secretary Vasquez met with respondents Acevedo and Mercado, singled Cordeco out for particularized treatment, and allowed it to languish without a permit while all others similarly situated to Cordeco extracted and sold their sand. The responsibility of Secretary Vasquez for his failure to exercise discretion and grant or deny the application, as was his statutory duty, cannot now be placed solely upon his subordinates' shoulders. Even if such subordinates were in error in advising certain conduct, their responsibility was not alone, for it was the Secretary's statutory responsibility to insure that the application was formally granted or denied—not allowed to remain unresolved during his entire tenure in office.

In promulgating its recent decisions in the area of qualified immunity, this Court has not defined the scope of an administrator's reliance upon the decisions of his subordinates. The question to be answered is clearly not that raised within the *Robertson* case, wherein the official in question had no contact with the wrong, but is apparently

sued because of his representative capacity. The matter is not answered by *Barr* and its progeny, wherein the rationale behind the overruled theory of absolute immunity for executive officials was to allow such officials to function without the threat of an action seeking money damages, the sole caveat being whether the official in question performed within the scope of his responsibilities. Nor is the matter answered where an official affirmatively performs a discretionary function, by relying upon opinions of his subordinates. Herein, whereas the inaction of Vasquez is alleged to be in reliance upon his subordinates, it is never the less clear that he did not exercise the discretionary function he was statutorily mandated to carry out. The doctrine of qualified immunity must be further amplified by this Court to define whether an executive official, aware of the facts and circumstances behind an administrative decision and under a statutory *duty* to exercise discretion may decline to exercise that discretion and then demand an immunity over his inaction stating, as one of his reasons, that any wrong done was committed by those in a lower echelon of government. It is to this Court that the time is ripe to juridically define the concept—"the buck stops here."

## II. Attorney's Fees.

A review of the order of the court below is sought against all respondents—not merely Acevedo and Mercado. Such shall be argued should the Court grant the instant petition. The reasons in favor of such a decision were amply covered in the original petition.

## CONCLUSION

**For the foregoing reasons the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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